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| Musachio v Musachio |
| 2013 NY Slip Op 32088(U) |
| August 28, 2013 |
| Supreme Court, Suffolk County |
| Docket Number: 1224469 |
| Judge: Peter Mayer |
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Plaintiff and defendant Annmarie Musachio were divorced on December 21, 2011 after entering into a stipulation of settlement on August 15, 2006¹. The judgment of divorce, entered by the Suffolk County Clerk on December 29, 2011, indicated that the agreement and the Court's memorandum decision and order after trial dated April 7, 2011, which modified the stipulation to some extent, "shall be incorporated by reference in this Judgment of Divorce." The judgment of divorce further provided that "equitable distribution and ancillary issues shall be in accordance with the August 15, 2006 settlement agreement." Pertinent portions of the August 15, 2006 stipulation of settlement state as follows. (The italicized portions of the stipulation represent handwritten changes made by the parties.)

ARTICLE V
FINAL DISPOSITION OF EQUITABLE DISTRIBUTION

2. The parties intend that their real and personal property division, as provided in this agreement, shall be final and irrevocable. Unless the parties execute a formal amendment to this agreement, in writing, it is their intention that the HUSBAND'S separate property shall forever remain his and the WIFE'S separate property shall forever remain hers notwithstanding (a) the reconciliation of the parties; (b) the rescission of termination of this agreement; or (c) a remarriage of the parties to each other, in the event they are hereafter divorced.

ARTICLE VI
EQUITABLE DISTRIBUTION AND DIVISION OF ASSETS

5. Marital Residence

(B) Simultaneously, with the execution of this Stipulation of Settlement, the Husband shall execute a Bargain and Sale Deed with Covenants transferring all of the Husband's rights, title and interest to the building and surrounding land known by and as 18 Springbriar Lane, Kings Park, New York to the Wife. The Husband shall be responsible for any liens, judgments, parking violations in his individual name either "of record" or "on notice" as of August 15, 2006. **However, any judgment or lien arising from this matrimonial action for pendente lite*

¹The court's records reflect and the submissions of the parties show that this was a highly contested litigious matter involving some thirty-six motions, spanning over seven years, including appellate court involvement, and hearings before at least three different Supreme Court Justices.

arrears, shall be forgiven and superceded by the terms of this agreement. The wife shall execute any and all documents and satisfactions necessary to effectuate the terms of this Agreement/Stipulation.

(D) Within ninety days of this Stipulation of Settlement [^]extended for a reasonable period thereafter not to exceed 45 days the Wife shall cause the Husband's name to be removed from the two aforementioned mortgages with Chase and Country Wide.

Addendum Article VI

2. *Provided that the Husband is current on his support obligation, the wife shall not sell the marital residence to any bona fide 3rd party non family members for a period of twenty four months following the execution of this Stipulation of Settlement. It is specifically acknowledged, however, that in order for the wife to have the Husband's name removed from the Country Wide and Chase Mortgage/Equity loan, the defendant's mother and step father to wit: Maryann Williams and John Williams, shall be on title to the premises. The transfer of ownership of said marital premises from Annmarie Musachio to Maryann Williams and John Williams shall not be considered a sale of the premises as contemplated by the Stipulation of Settlement.*

4. *After the expiration of the twenty four month period, the wife shall have full interest in the marital premises known as 18 Springbrier Lane, Kings Park, NY without any further contingency to the Husband as specified herein.*

5. *This addendum shall be incorporated but not merged with the Judgment of Divorce, and together wit the typed Stipulation of Settlement shall survive the same.*

On August 10, 2006 a bargain and sale deed was executed transferring title of the premises known as 18 Springbrier Lane, Kings Park, New York from Mark A. Musachio and Annmarie Musachio to Annmarie Musachio. On September 24, 2007 Annmarie Musachio executed a bargain and sale deed transferring her interest in the said premises to Annmarie Musachio, John Williams and Maryann Williams. Thereafter, on December 15, 2007, Annmarie Musachio, John Williams and Maryann Williams executed a bargain and sale deed transferring the premises to Maryann Williams.

In or about August 2012 plaintiff commenced the within action against his former spouse, defendant Annmarie Musachio, and her mother and step-father, defendants Maryann Williams and John Williams (“the Williams defendants”), to recover damages, both compensatory and punitive, for defendants’ alleged breaches [of subsequent court orders], contemptuous acts, and unjust enrichment, and for the declaration of an equitable lien on the premises all in connection with the transfer of the premises to defendants Williams from defendant Annmarie Musachio. Defendants Williams now move for an order dismissing plaintiff’s complaint against them on the grounds that it fails to state a cause of action, that affirmative defenses are based upon documentary evidence, and that the causes of action do not qualify as a basis for filing a notice of pendency. The Williams defendants also seek an order directing the Clerk of the County of Suffolk to vacate the notice of pendency and granting counsel fees. Plaintiff cross moves for an order permitting him to amend his complaint.

The court may grant a motion to dismiss pursuant to CPLR 3211 (a) (1) “only where the documentary evidence utterly refutes plaintiff’s allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 746 NYS2d 858 [2002]; *Sobel v Ansanelli*, 98 AD3d 1020, 951 NYS2d 533 [2d Dept 2012]; *Harris v Barbera*, 96 AD3d 904, 947 NYS2d 548 [2d Dept 2012]). In order to qualify as “documentary evidence” the printed materials “must be unambiguous and of undisputed authenticity” (*Fontanetta v John Doe 1*, 73 AD3d 78, 86, 898 NYS2d 569 [2d Dept 2010]). Generally, printed materials such as letters and e-mails are not considered “undeniable” or an out-of-court transaction which are equivalent to documentary evidence (*see North Shore Towers Apt. Inc. v Three Towers Assoc.*, 104 AD3d 825, 961 NYS2d 504 [2d Dept 2013]; *Fontanetta v John Doe 1, supra*), nor is a retainer agreement (*Harris v Barbera, supra*)

In determining whether to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must assume to be true the facts plead, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (*Dickinson v Igoni*, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; *Tsutsui v Barasch*, 67 AD3d 896, 892 NYS2d 400 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). In determining if a pleading states a cause of action, “the sole criterion” for the Courts is whether “from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

Here, the allegations in plaintiff’s complaint are “utterly refuted” by the documentary evidence submitted, *i.e.* the August 15, 2006 stipulation of settlement and the judgment of divorce dated December 21, 2011, and therefore, the complaint must be dismissed (*see Goshen v Mutual Life Ins. Co. of N.Y., supra; Sobel v Ansanelli, supra; Harris v Barbera, supra*). Each of the four causes of action, all disjointed and inarticulate, are based upon the premise that a transfer of the marital premises to the parents of defendant Annmarie Musachio was designed and calculated to render her judgment proof in the years after the transfer. However, it is clear that the parties contemplated this very transfer in the 2006 stipulation, long before the matrimonial and custodial issues became so protracted. Thus, the

documentary evidence conclusively establishes as a matter of law that no cause of action can be based upon a transfer of the premises to the Williams defendants by defendant Annmarie Musachio.

Similarly, no cognizable legal theory has been asserted in the complaint against the Williams defendants. Each allegation as to defendants' purported breach, contemptuous conduct, and unjust enrichment is stated as against defendant Annmarie Mustachio. No allegation is made with regard to conduct of defendants Williams. As such, the allegations fit no cognizable legal theory against them and must be dismissed (*see (Dickinson v Igoni, supra; Tsutsui v Barasch, supra)*). Accordingly, the motion of the Williams defendants is granted and plaintiff's complaint is dismissed against the them. As the plaintiff has failed to show that the action against the Williams defendants was prosecuted in good faith, pursuant to CPLR 6514 (b), the Clerk of the County of Suffolk is directed to vacate any *lis pendens* which may have been placed upon the premises known as 18 Springbriar Lane, Kings Park, New York.

CPLR 6514 (c) provides that "[t]he court, in an order canceling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action." An award of reasonable counsel fees is permitted under this section (*see The Dermot Co., Inc. v 200 Haven Co.*, 73 AD3d 653, 901 NYS2d 268 [1st Dept 2010]; *Sorenson v 257/117 Realty, LLC*, 62 AD3d 618, 881 NYS2d 43 [1st Dept 2009] *lv dismissed* 13 NY3d 935, 895 NYS2d 311 [2010]; *#1 Funding Center, Inc. v H & G Operating Corp.*, 48 AD3d 908, 853 NYS2d 178 [3d Dept 2008]). Inasmuch as the Williams defendants have requested counsel fees in the sum of \$3,645.00 for the defense of the baseless action instituted against them by plaintiff, which sum has not been contested by plaintiff, the court finds that the amount is reasonable in light of the work required to defend and to bring this motion. Thus, attorneys' fees in the sum of \$3,645.00 are awarded to the Williams defendants payable by plaintiff.

Turning to the complaint as asserted against defendant Annmarie Musachio, it is noted that the July 30, 2012 decision and order of the Hon. Carol MacKenzie, J.S.C. stated that "[t]he Court is also constrained, based upon the protracted and unnecessary litigation attending the cessation of this marriage, to require either party to this action must obtain [*sic*] leave of Court before filing any additional [motions]. Such leave will only be granted on an assessment of the issue to be decided and the relief sought" (*Musachio v Musachio*, Sup Ct, Suffolk County, July 30, 2012, MacKenzie, J., Index No. 21672/04). Here, it would appear that plaintiff has attempted to circumvent the order of Justice MacKenzie by filing a new action on August 10, 2012, less than two weeks after the order directing that leave of court be obtained before further action be taken, by adding additional defendants who were not parties to the matrimonial proceeding. Inasmuch as this Court has dismissed the action as to the defendants Williams (and finds that it borders on frivolous), leave from Justice MacKenzie must be obtained before this matter may proceed against defendant Annmarie Musachio (that is, should plaintiff wish to pursue the matter which should ultimately be dismissed based upon documentary evidence and the failure to state a cause of action). Thus, the petition as asserted against defendant Annmarie Musachio is dismissed without prejudice to obtaining leave from Justice MacKenzie. It is obvious that plaintiff's filing of the within action was a blatant attempt to circumvent and flaunt the July 30, 2012 order of Justice MacKenzie.

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With regard to plaintiff's motion to amend the pleadings, CPLR 3025 (b) states:

Amendments and supplemental pleadings by leave. [*Eff. on and after Jan. 1, 2012*] A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Although CPLR 3025 (b) directs that leave to amend pleadings shall be freely given in the absence of prejudice or surprise, where the proposed amendment is devoid of merit, leave to amend should be denied (*see Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC*, 82 AD3d 1035, 920 NYS2d 123 [2d Dept 2011]; *Ingrami v Rovner*, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]; *Hill v 2016 Realty Assoc.*, 42 AD3d 432, 839 NYS2d 801 [2d Dept 2007]).

Here, where the complaint has been dismissed as herein above indicated, the motion to amend same is denied as moot. However, the court notes that plaintiff failed to clearly show the changes or additions in his proposed amended complaint. Additionally, the Court finds that the proposed amended complaint provides no further or additional allegations which would rehabilitate it sufficiently to state a valid cause of action against any of the defendants. Accordingly, as it does not comply with CPLR 3025 (b) and is devoid of merit, plaintiff's motion to amend the complaint would be denied on the merits as well.

Dated: _____

8/28/13



PETER H. MAYER, J.S.C.